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IN THE

Supreme Court of the United States

October Term, 1947 No. 176

GEORGE I. PEARCE,
Petitioner,

v.

PENNSYLVANIA RAILROAD CO., a corporation, and ESTHER HOFKIN, individually and trading as PENN GALVANIZING CO.,
Respondent.

Brief in Opposition to Petition for Certiorari to the United States Circuit Court of Appeals for the Third Circuit as of October Term, 1946, No. 9183.

W. WILSON WHITE,
THOMAS RAEBURN WHITE,
WHITE & WILLIAMS,
19th Floor, Land Title Bldg.,
Philadelphia, 10, Pa.,
Attorneys for Esther Hofkin, individually and trading as Penn Galvanizing Co.,
Respondent.

The Legal Intelligencer, 1218 Chestnut St., Phila. 7, Pa.

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COUNTERSTATEMENT OF QUESTION INVOLVED

Does a District Court have jurisdiction of a civil action for common law negligence brought by a Pennsylvania plaintiff against a Pennsylvania defendant because the plaintiff has joined in the same suit as a co-defendant his employer, an interstate railroad, for a cause of action arising under the Federal Employers Liability Act?

(Answered in the negative by the Court below.)

COUNTERSTATEMENT OF FACTS

Petitioner, a citizen of Pennsylvania, is an employee of the Pennsylvania Railroad Company, a common carrier by rail engaged in interstate commerce. Respondent, a citizen of Pennsylvania, owns and operates a business in the City of Philadelphia served by a siding of the railroad. The petitioner brought a civil suit in the District Court for the Eastern District of Pennsylvania against respondent and the Pennsylvania Railroad Company for injuries caused by an asserted unsafe condition of a walkway beside the track located within the property of respondent. The complaint avers that the action arises under the Federal Employers Liability Act and the Safety Appliance Acts "and under the common law of Pennsylvania." The negligence averred in the complaint is the maintenance of the premises in a dangerous condition, and the complaint charges both respondent and the Pennsylvania Railroad Company with the creation of such condition and the failure to give petitioner warning thereof. Respondent filed a motion to dismiss the complaint as to her on the ground of want of jurisdiction. When the case was argued upon this motion, petitioner introduced into the record a written agreement of indemnity, under the terms of which respondent agreed to indemnify the railroad against liability for injury occurring on the premises as the result of respondent's negligence.

After hearing, the District Court dismissed the action as to respondent, without prejudice, for want of jurisdiction, which action was affirmed by the Circuit Court of Appeals.

The Pennsylvania Railroad Company appeared and answered the complaint on the merits. It has not at any stage sought to join respondent as a third party defendant.

ARGUMENT

Reduced to its simplest terms, this case involves the single question whether Rule 20 of the Federal Rules of Civil Procedure, relating to original joinder of parties, permits a plaintiff to join *at the outset of the proceedings* an admittedly non-federal cause of action against one defendant, with a federal cause of action against another defendant. The answer depends entirely upon the statutes referring to jurisdiction of the subject matter of the district courts and this Court's interpretation of those statutes; the mandate of Rule 82 prevents any interpretation of Rule 20 which would enlarge such jurisdiction: *Mississippi Pub. Corp. vs. Murphree*, 326 U. S. 438.

The action between petitioner and respondent is a local controversy between citizens of the same state, one of whom has been injured and seeks damages from the other. It is "business that intrinsically belongs to the state courts" of which the federal courts should be kept free in accordance with Congressional policy: *Indianapolis vs. Chase National Bank*, 314 U. S. 63, 76. Federal jurisdiction of such a local dispute cannot be created by joining the defendant with another as to whom diversity of citizenship exists: *Strawbridge et al. vs. Curtiss et al.*, 3 Cranch 267; *Indianapolis vs. Chase National Bank*, supra, p. 69. Nor can a plaintiff support jurisdiction of a non-federal cause of action by joining it with a cause of action arising under a federal statute: *Geneva Furniture Mfg. Co. vs. Karpen*, 238 U. S. 254; *Hurn vs. Oursler*, 289 U. S. 238. The principle that the device of joinder with a federal cause of action does not render a non-federal cause justiciable by a district court has been clearly established by this Court. There is no conflict in the decisions of the lower courts upon this question, nor any other reason suggesting that a review by this Court is required.

Petitioner's main argument is addressed to his contention that the action against respondent is ancillary to the action against the railroad, hence no independent juris-

dictional grounds are required to sustain it. The crux of his argument is that an "ancillary action" is an arbitrary term which has been devised to describe a "result", and that since the concept is unfettered by logic or reason, it may as well be used to describe and justify the result desired by petitioner. The term has not been so misused as petitioner asserts. An ancillary action has been defined on many occasions by this Court as one that is auxiliary or supplemental to the principal suit: *Minnesota Co. vs. St. Paul Co.*, 2 Wall. 609; *Carey vs. Houston & Texas Ry.*, 161 U. S. 115; *Dugas vs. American Surety Co.*, 300 U. S. 414. The function of the ancillary action may be to construe the decree in the principal action (*Minnesota Co. vs. St. Paul Co.*, supra); to attack the decree (*Carey vs. Houston & Texas Ry.*, supra); or to carry it into effect (*Dugas vs. American Surety Co.*, supra). In each such case independent grounds of federal jurisdiction are not required for the sound reason that the action is dependent upon a principal case in which jurisdiction has attached, and to require separate jurisdictional grounds in the ancillary action might render the principal court powerless to give full and proper effect to its judgment. It is clear that the ancillary action in the federal courts has been defined and limited to accomplish a definite purpose, and that an action which does not serve such a purpose will not be classed as ancillary.

Petitioner's description of his suit against respondent as ancillary to his suit against his employer does not meet this test. His action under the Employers Liability Act is complete and independent of his common law action against respondent. The holding of the court below that the actions are independent is not contrary to the decisions of any other circuit court of appeals. The case of *Missouri Pacific Ry. Co. vs. Mette*, 261 Fed. 755 (C. C. A. 8th), asserted to be in conflict, is entirely consistent with the decision below. In that case plaintiff, an employee of the receiver of Missouri Pacific Railway, sued the receiver

under the Federal Employers Liability Act. He joined as a co-defendant the Missouri Pacific Railroad Company, a corporate successor to which the receiver had transferred the assets of the carrier after plaintiff's cause of action had accrued. Jurisdiction as to the Railroad Company was sustained as ancillary on the ground that the Railroad was *secondarily* liable to satisfy any judgment obtained by the plaintiff, such liability being dependent upon first establishing the primary liability of the receiver. The decision approving joinder was clearly correct, since the suit against the Railroad was for the purpose of enforcing the judgment against the principal defendant. Petitioner can point to no case in which a suit charging two co-defendants with primary liability has been held ancillary as to either of them. Petitioner's complaint charges both defendants with primary liability. Respondent under no theory could be secondarily liable for any judgment against the railroad: the "indemnity agreement" between the parties merely holds the railroad harmless for *respondent's* negligent acts.

The construction of Rule 14 is in no way involved. The Pennsylvania Railroad Company has not moved to join respondent as a third-party defendant, and the question of petitioner's right, in the event of such joinder, to amend his complaint to state a cause of action against respondent as a third-party defendant, is not presented. If such question were presented, its solution would appear to be settled against petitioner's contention that he could amend to proceed against respondent. See cases cited in the Report of the Advisory Committee to this Court, 5 F. R. D. 434, 447, holding that a plaintiff cannot so amend unless grounds exist for an original suit against the third-party defendant. *People vs. Maryland Casualty Co.*, 132 F.(2d) 850 (C. C. A. 7th), cited by petitioner as inconsistent with the decision below, is in entire agreement with the cases cited by the Advisory Committee and with the decision of the court below. Third-party defendants after being add-

ed to the record attacked the original complaint and the third-party complaints by motions to dismiss for failure to state a cause of action, and the complaint and third-party complaints were dismissed on that ground. In affirming judgment of dismissal the majority of the circuit court of appeals thought that no jurisdictional question was involved (ibid. p. 853). In a concurring opinion one judge stated his opinion that permitting the third-party defendants to attack the complaint destroyed jurisdiction, there being lack of diversity between the plaintiff and the third-party defendants. The decision of the majority did not decide that there was jurisdiction to adjudicate a controversy between these parties, but affirmed the judgment of dismissal without discussion of jurisdiction. The case was properly disposed of without determination of any jurisdictional question, since the third-party defendants had attacked the third-party complaints as well as the original complaint. The dismissal of the third-party complaints necessarily carried with it dismissal of the original complaint, since the original defendant was the surety of the third-party defendants.

Petitioner argues that the settled rules of jurisdiction should not be applied to prevent the joinder of an alleged joint tort-feaser with a railroad employer. There is no basis for such a contention. The concurrent jurisdiction of the state courts is available for such joint suits; for 37 years Congress has prohibited removal of Employers Liability cases from state courts of competent jurisdiction (45 U. S. C. §56). The federal forum may be more desirable to some plaintiffs, but the state court is the more appropriate to entertain a suit for common law negligence. Certainly the policy of Congress is against further additions of local controversies to the heavily overburdened federal calendars: *Indianapolis vs. Chase National Bank*, supra, 314 U. S. at p. 76.

CONCLUSION

The decision of the court below is not inconsistent with the rulings in any other circuit. No novel questions of interpretation of the Rules of Civil Procedure are presented. It is respectfully submitted that the petition should be denied.

Respectfully submitted,

W. WILSON WHITE,
THOMAS RAEBURN WHITE,
WHITE & WILLIAMS,
Attorneys for Esther Hofkin, individually and trading as Penn Galvanizing Co.,
Respondent.